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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/561,002

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Katrien Maria Josefa Van Laere

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EXAMINER

WILLIAMS, LELA

ART UNIT

PAPER NUMBER

1789

NOTIFICATION DATE

DELIVERY MODE

05/11/2011

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

DocketingDept@young-thompson.com

Office Action Summary	Application No. 10/561,002	Applicant(s) VAN LAERE ET AL.	
	Examiner LELA S. WILLIAMS	Art Unit 1789	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 24 February 2011.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 11, 12 and 20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 11, 12 and 20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

1. Applicant's amendment filed February 24, 2011 has been fully considered, however the amendment necessitated the new grounds of rejection set forth below. Therefore, the following action is made final.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

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5. Claims 11, 12, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Koren et al. US 6,884,445 in view Tarral WO 96/33694.

Regarding claim 11, Koren discloses a hot liquid fiber product comprising a reconstitutable composition comprising a mixture of at least 0.1g of pectin (col. 6, lines 10-20), note that the reference does not state “per serving”, however, as a serving is a relative term, and given the disclosed amount is added to the product, which can be interpreted as just one serving; the reference meets the claim limitation. Koren also discloses an indigestible oligosaccharide with a degree of polymerization between 2 and 60 monose units (col. 5, line 29). The composition also comprises a calcium salt having a solubility below about 0.15 g per 100 ml of water at 20°C and at pH 7 which provides more than 0.05 g of dissolved calcium per 100ml water at a pH below 4 and at a temperature of 37°C (col. 6, lines 45-65). It is noted that the viscosity of the reference exceeds that which is presently claimed at 37°C (col. 12, lines 41-65); however the reference does disclose “[t]o decrease the viscosity of the present composition (at near neutral pH), ingredients may advantageously be added” (col. 13, lines 10-20). Therefore, given the guidance of the reference, one of ordinary skill would have been able to obtain a viscosity below about 100mPas at a pH that exceeds 4. It is also noted that although the reference teaches the use of an effervescent system with pectin is known in the art (col. 2, lines 1-10) and the use of a calcium salt, such as calcium carbonate, the reference does not disclose the invention to comprise an “effervescent system”.

Tarral discloses a composition “compris[ing] at least one pectin associated with a complex composition comprising firstly an effervescent pair which easily disperses the pectin in water and hydrates it and regulates the gellification process irrespective of the hardness of the

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water used for the suspension, and secondly a mixture of compounds which provide the calcium ions necessary for the formation of the gel in an acid medium, together with magnesium ions regulating the kinetics of the calcium availability.”(Abstract).

Therefore, it would have been obvious to one of ordinary skill in the art to incorporate the effervescent system as disclosed by Tarral into the invention of Koren in efforts to disperse the pectin in water and hydrate it and regulate the gellification process.

Regarding claim 12, Koren discloses a hot liquid fiber product comprising a calcium salt having a solubility below about 0.15 g per 100 ml of water at 20°C and at pH 7 which provides more than 0.05 g of dissolved calcium per 100ml water at a pH below 5 and at a temperature of 37°C (col. 6, lines 45-65), fiber between 0.1 g and 10g per 100ml (said range clearly falls within the claimed range) (col. 11, lines 13-15), an indigestible oligosaccharide with a degree of polymerization between 2 and 60 monose units (col. 5, line 29), also the product has a viscosity below about 100mPas (col. 12, lines 45-50) and “[p]erferably the composition has a viscosity at pH 3 and 37°C which exceeds 250mPas.” (col. 12, lines 55-58).

Koren is silent to the addition of a bicarbonate base.

Tarral discloses a composition “compris[ing] at least one pectin associated with a complex composition comprising firstly an effervescent pair which easily disperses the pectin in water and hydrates it and regulates the gellification process irrespective of the hardness of the water used for the suspension, and secondly a mixture of compounds which provide the calcium ions necessary for the formation of the gel in an acid medium, together with magnesium ions regulating the kinetics of the calcium availability.”(Abstract). The reference teaches the alkali

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carbonate is sodium bicarbonate (machine translation, page 1) and although the reference does not teach and specific amount the reference does show the use of at least about 0.1 part by weight in the examples. As such, since the instant specification is silent to unexpected results, the specific amount of bicarbonate is not considered to confer patentability to the claims. As the effervescent effect is a variable that can be modified, among others, by adjusting the amount of bicarbonate, the precise amount would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of bicarbonate in Tarral to obtain the desired effervescent effect (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223). Therefore, one of ordinary skill in the art would have determined a suitable amount of bicarbonate for the invention, including that which is presently claimed.

Regarding claim 20, claim 11 is applied as discussed above. As noted, Tarral discloses a composition “compris[ing] at least one pectin associated with a complex composition comprising firstly an effervescent pair which easily disperses the pectin in water and hydrates it and regulates the gellification process irrespective of the hardness of the water used for the suspension, and secondly a mixture of compounds which provide the calcium ions necessary for the formation of the gel in an acid medium, together with magnesium ions regulating the kinetics

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of the calcium availability.”(Abstract). The reference teaches the effervescent couple consists of citric acid and sodium bicarbonate (machine translation, page 1). It is noted that the reference does not disclose the specific amounts of each component; however, since the instant specification is silent to unexpected results, the specific amount of acid and bicarbonate is not considered to confer patentability to the claims. As the effervescent effect is a variable that can be modified, among others, by adjusting the amount of acid and bicarbonate, the precise amount would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of acid and bicarbonate in Tarral to obtain the desired effervescent effect (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223). Therefore, one of ordinary skill in the art would have determined a suitable amount of acid and bicarbonate for the invention, including that which is presently claimed.

Response to Arguments

6. Applicant's amendment is sufficient to overcome the previous 35 U.S.C. 102(b) rejection of claim 12. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of 35 U.S.C. 103(a) as being unpatentable over Koren et al. US 6,884,445 in view Tarral WO 96/33694.

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Applicant argues that Koren et al does not disclose or suggest an effervescent system, however, acknowledge by the Examiner, it is also noted that although the reference teaches the use of an effervescent system with pectin is known in the art (col. 2, lines 1-10) and the use of a calcium salt, such as calcium carbonate, the reference does not disclose the invention to comprise an “effervescent system”; which is why the reference is applied in view of the secondary reference, Tarral. Applicant states Koren only refers to the temperature in its examples; however note that the Abstract clearly states:

One aspect of the present invention relates to a liquid edible composition with a pH of more than 6, a viscosity below 600 mPas at a shear rate of 100s.^{sup}.-1 and 20.degree. C., and a viscosity of at least 125% of the aforementioned viscosity at a pH below 5 and a temperature of 37.degree.C

this is the same as the temperature as presently claimed.

Applicant also argues that Koren teaches away from the uses of the effervescent systems as taught by Tarral. However, note that nowhere in the reference does Koren state the effervescent system can not be used, Koren merely states prior art references, including Tarral, are “not perfectly suited for the treatment of obesity or overweight” because of insufficient viscosity (col. 2, lines 34-40). Koren does not teach against the use of the effervescent system.

Applicant further states that Tarral does not disclose the presently claimed temperature. However, note that while Tarral does not disclose all the features of the present claimed invention, Tarral is used as teaching reference, and therefore, it is not necessary for this secondary reference to contain all the features of the presently claimed invention, *In re Nievelt*, 482 F.2d 965, 179 USPQ 224, 226 (CCPA 1973), *In re Keller* 624 F.2d 413, 208 USPQ 871, 881 (CCPA 1981). Rather this reference teaches a certain concept, namely pectin associated with

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an effervescent system, and in combination with the primary reference, discloses the presently claimed invention.

In response to applicant's argument that “nothing in the proposed combination suggests that the problems of lumping and of poor taste of high fiber compositions could be solved simultaneously by using an effervescent system”, the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985).

Applicant also argues that “it is very uncommon to use high temperatures when reconstituting effervescent composition”; however, it is noted that “the arguments of counsel cannot take the place of evidence in the record”, *In re Schulze*, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965). It is the examiner's position that the arguments provided by the applicant regarding the effects of high temperature must be supported by a declaration or affidavit. As set forth in MPEP 716.02(g), “the reason for requiring evidence in a declaration or affidavit form is to obtain the assurances that any statements or representations made are correct, as provided by 35 U.S.C. 24 and 18 U.S.C. 1001”.

Conclusion

7. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO**

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MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to LELA S. WILLIAMS whose telephone number is (571)270-1126. The examiner can normally be reached on Monday to Thursday from 7:30am-5pm (EST).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Humera Sheikh can be reached on 571-272-0604. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Humera N. Sheikh/
Supervisory Patent Examiner, Art Unit 1789

/LELA S. WILLIAMS/
Examiner, Art Unit 1789

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